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# In the Supreme Court of the United States

OCTOBER TERM, 1981

INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, Local 799, INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, and T.W. GLEASON, Individually and as he is President of International Longshoremen's Association, AFL-CIO and H.R. HASSELGREN, Individually and as he is Secretary-Treasurer of International Longshoremen's Association, AFL-CIO and N.J. BOWERS, Individually and he is Executive Vice President of International Longshoremen's Association, AFL-CIO and F.R. FIELD, JR., Individually and as he is General Organizer of International Longshoremen's Association, AFL-CIO and A. SCOTTO, Individually and as he is Regional Director of International Longshoremen's Association, AFL-CIO and J.T. MOOCK, Individually and as he is First Vice President of International Longshoremen's Association, AFL-CIO and R.A. MASSEY, Individually and as he is Second Vice President of International Longshoremen's Association, AFL-CIO and G.W. DIXON, Individually and as he is Third Vice President of International Longshoremen's Association, AFL-CIO and W.P. LYNCH, Individually and he is Fourth Vice President of International Longshoremen's Association AFL-CIO,

PETITIONERS,

*v.*

ALLIED INTERNATIONAL, INC.,

RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## BRIEF FOR RESPONDENT

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I

## Question Presented

Whether union conduct which would constitute an unlawful secondary boycott if undertaken for the purpose of advancing the employment related interests of American workers is legitimized when the conduct is intended to protest the foreign policy of another country in circumstances where the means of the protest could reasonably be expected to threaten neutral American employers with ruin or substantial loss?

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*v.*

ALLIED INTERNATIONAL, INC.,[1]

RESPONDENT.

## ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

## BRIEF FOR RESPONDENT

[1] Allied International, Inc.'s subsidiary and its affiliated corporations are set forth at page 1 n.1 of Allied's Response to Petition for Writ of Certiorari in this case.

## Introduction

Respondent submits this brief pursuant to Rules 34(2) and 35(2) of the Rules of this Court in response to the brief filed by petitioners.[2]

## Statutory Provisions Involved

The relevant statutory provisions include Sections 8(b)(4) and 303 of the Labor Management Relations Act, 1947 (hereinafter cited as the "Labor Management Relations Act" or the "LMRA"), 29 U.S.C. §§ 158(b)(4) and 187. The pertinent parts of these statutes are reproduced in the ILA's petition for certiorari at pp. 2-3. The relevant statutory provisions also include Section 2(6) and (7) of the National Labor Relations Act as amended (hereinafter cited as the "National Labor Relations Act" or the "NLRA"), 29 U.S.C. § 152(6) and (7), and Section 501(1) and (3) of the Labor Management Relations Act, 29 U.S.C. § 142(1) and (3). The pertinent parts of these statutes are reproduced in the Appendix to this brief.

## Statement of the Case

The procedural posture of this case can be best understood if considered in conjunction with the development and pending status of NLRB Case No. I-CC-1753, which on August 28, 1981 resulted in a Decision and Order of the National Labor Relations Board (hereinafter "NLRB") reported at 257 NLRB No. 151, S.M. at 1a *et seq.* This broader view is necessary in light of the parties' evident disagreement, as addressed at pp. 6-7 *infra*, over the exact current status of the instant case. Both the instant case and NLRB Case No. I-CC-1753 arise out of the same facts and, insofar as relevant to this petition for writ of certiorari, involve the same legal issues.[3]

---

[2] Petitioners will hereafter be referred to in this brief as the "ILA" or the "union", and respondent will be referred to as "Allied". References to various appendices shall conform to the form adopted by the ILA at p. 1 n. 1 of its brief, i.e., references to the appendices to the Petition for a Writ of Certiorari herein are designated: "__ a", to the Joint Appendix: "J.A. at ____" and to the appendix to the Supplemental Memorandum for the United States as Amicus Curiae: "S.M. at ____".

[3] The ILA's petition for certiorari in this case involves only the count of Allied's complaint alleging that the ILA's Russian boycott violated § 303 of the LMRA. This count raises the same legal issues as NLRB Case No. 1-CC-1753. *See* n.5 *infra*. Allied's cross-petition for certiorari (No. 80-1906) with respect to its admiralty tort and antitrust counts, which raise other legal issues, is still pending before this Court.

The court of appeals below found the basic facts giving rise to this case to be as follows:

> Allied International, Inc. is an importer of Russian wood products, which has contracted with two agencies of the USSR for the purchase of birch hardwood and plywood. Allied has also contracted (through a third Soviet agency) with Waterman Steamship Co. for the shipment of these wood products to the United States from the USSR. Waterman employs John T. Clark & Son, a stevedoring company, to unload its ships docking in Boston. Clark's initial source of longshoremen is a hiring hall, operated by defendants International Longshoremen's Association (ILA) and its Local 799 pursuant to a collective bargaining agreement between the unions and the Boston Shipping Association.
>
> On January 9, 1980, one of Waterman's ships, the *Walton*, was in Boston unloading a portion of Allied's plywood and hardwood, prior to further unloading at other ports along the East Coast. On that date, defendant Thomas Gleason, President of the ILA, ordered ILA members to cease handling cargoes bound for or arriving from the Soviet Union, in protest of the invasion of Afghanistan by Soviet armed forces.[4] In response to Allied's inquiries, Gleason informed Allied that ILA members would unload the *Walton's* cargo in Boston, but not at any other United States port. As a result, Waterman cancelled the *Walton's* scheduled calls, and unloaded all of Allied's wood products cargo in Boston, where it was stored, accruing demurrage and security charges. Waterman also restricted the cargo then being loaded into the *Middleton* in Leningrad to one-third its scheduled size, cancelled its delivery to scheduled United States

[4] The text of Mr. Gleason's order is omitted. It can be found at 3a, J.A. at 11a, and S.M. at 3a-4a, 45a.

ports, and unloaded the wood products in Montreal. In addition, Waterman repudiated its agreement to transport Allied's wood products aboard the *Jefferson*, which had not yet been loaded. ILA and Local 799 representatives informed Allied on March 12 and March 25, 1980 that no ILA members would unload any cargo originating in the USSR. 2a-3a, 640 F.2d at 1369-1370, J.A. at 32a-47a.

As a result of Mr. Gleason's order, Allied lost the great bulk of its twenty-five million dollar a year business of importing wood from Russia. J.A. at 24a-28a, 38a.

Confronted by these facts, Allied in March of 1980 filed two actions. First, pursuant to Section 10(b) of the National Labor Relations Act, 29 U.S.C. § 160(b), it filed an unfair labor practice charge, NLRB Case No. I-CC-1753. It also filed the complaint in the United States District Court for the District of Massachusetts giving rise to this case alleging (1) that the ILA's conduct violated Section 303[5] of the Labor Management Relations Act (2) that it was a tort cognizable in admiralty and (3) that it violated the Sherman Act. J.A. at 6a-20a.

Pursuant to Section 10(b) and 10(1) of the NLRA, the NLRB's Acting Regional Director issued an unfair labor practice complaint against the ILA and filed a request for preliminary injunctive relief in the United States District Court for the District of Massachusetts. This request was denied by the district court in *Walsh* v. *ILA*, 488 F. Supp. 524 (D. Mass. 1980) on the ground that the ILA's conduct was not secondary and therefore did not violate Section 8(b)(4). The Acting Regional Director appealed this denial to the United States Court of Appeals for the First Circuit. In *Walsh* v. *ILA*,

[5] Section 303 of the LMRA grants a right to sue for damages in federal district court to a party injured in his business or property by reason of union conduct violating § 8(b)(4) of the NLRA. Thus, the legal and factual issues raised in the NLRB unfair labor practice case and in the first count of Allied's complaint in this case are identical. As discussed in more detail at pp. 11-12 *infra*, the NLRA is Title I of the LMRA.

630 F.2d 864 (1st Cir. 1980), the circuit court vacated the district court's determination but remanded with instructions to dismiss the Acting Regional Director's injunction request on the ground that since the NLRB, and not its individual regional director, was in substance the real petitioner in a Section 10(1) proceeding, the dismissal of a Section 10(1) petition attacking the ILA's Russian boycott in an earlier filed case in another district[6] was *res judicata* to the injunction request.

Meanwhile, in August, 1980 the Acting Regional Director's complaint was tried in two days of hearing on the merits before NLRB Administrative Law Judge, Bernard Ries. On March 16, 1981, Judge Ries issued a decision in which he made all "factual and inferential findings which would be necessary or useful in further processing" of the case but concluded that the complaint should be dismissed for want of jurisdiction largely upon the rationale of *Baldovin* v. *ILA*, 626 F.2d 445 (5th Cir. 1980). S.M. at 43a *et seq*. Judge Ries' decision was appealed to the Board by both Allied and the Board's General Counsel, and on August 28, 1981 the Board issued its Decision and Order reversing Judge Ries and finding that the ILA's conduct violated Section 8(b)(4). S.M. at 1a-42a.

Meanwhile, Allied's second legal challenge to the ILA's boycott, its three count federal district court complaint in this case, was also proceeding. On June 17, 1980, the district court granted an ILA motion for summary judgment dismissing all three counts of Allied's complaint. The district court's Memorandum and Order is reproduced at Appendix C to the ILA's petition for certiorari in this case. Allied appealed, and on January 6, 1981 the court of appeals reversed the grant of summary judgment on the Section 303 count,[7] but sustained

[6] *Baldovin* v. *ILA*, Civil No. 80-259 (S.D. Tex. Feb. 15, 1980), *aff'd*, 626 F.2d 445 (5th Cir. 1980).

[7] *Baldovin* v. *ILA* was not *res judicata* to this case because the parties to this case were Allied and the ILA rather than the NLRB, acting through a regional director, and the ILA. 4a-51, 640 F.2d at 1370.

it on the other two counts. 1a *et seq.* The ILA petitioned for certiorari on the issue of the court of appeal's reversal of the district court's grant of summary judgment on the Section 303 count, and this Court granted that petition on October 5, 1981.

Based on all of the above, this case is before this Court in a unique procedural posture. Considered in terms of only the formal record, it is merely in the common procedural posture of a court of appeal's reversal of a district court grant of a motion for summary judgment. On the other hand, considered in conjunction with the proceedings in NLRB Case No. I-CC-1753, the instant case has the added uncommon twist that many factual issues have already been resolved after a trial on the merits involving the same parties — which findings may collaterally estop both Allied and the ILA. *See H.L. Robertson & Assn.* v. *Plumbers Local Union No. 519*, 429 F.2d 520 (5th Cir. 1970); *Paramount Transport Systems* v. *Teamsters Local 150*, 436 F.2d 1064 (9th Cir. 1971); *Consolidated Express, Inc.* v. *New York Shipping Ass'n*, 641 F.2d 90 (3d Cir. 1981). However, consideration of this collateral estoppel question may be premature since the ILA has not yet had an opportunity to contest the NLRB's factual findings on the ground that they were not supported by substantial evidence on the record as a whole.[8]

In view of the foregoing, the ILA's argument at pp. 43-46 of its brief to the effect that the court of appeals below should not have granted Allied summary judgment and that, even if Allied prevails on the law, this Court should direct a trial on the merits is misplaced. As much as Allied may wish that the court below had granted it summary judgment, the fact remains that it did not do so. Rather, it vacated the district

[8] Petitions to review the Board's Decision and Order pursuant to § 10(f) of the NLRA, 29 U.S.C. § 160(f), were filed by both the ILA and Allied, and they are now pending before the United States Court of Appeals for the District of Columbia as Case Nos. 81-1974 and 81-2100, respectively. On October 30, 1981, that court of appeals, upon motion of the NLRB, stayed further processing of these review petitions until after the decision of this Court in the instant case.

court's grant of summary judgment to the ILA on Count I of Allied's complaint and remanded to the district court for further consideration of Allied's prayer for damages and injunctive relief. 24a, 640 F.2d at 1379. Accordingly, if this Court affirms the court of appeals below on the law, it should also affirm that court's remand to the district court. The district court then can decide any issues that may arise as to whether Allied should be granted summary judgment as to liability because the pleadings and/or affidavits in the record show that there are no contested relevant facts and/or because of the collateral estoppel effect of factual determinations in NLRB Case No. I-CC-1753.[9]

## Summary of Argument

A classic "hot cargo" type of secondary boycott in violation of the National Labor Relations Act and the Labor Management Relations Act occurs when union leadership representing employees of employer A orders those employees to refuse to handle product produced by, destined for or otherwise related to B because of a dispute that union or its leadership has with B. That the underlying dispute with B is political rather than economic and that this dispute is about an action taken by B outside of the United States rather than within its boundaries should not alter this result. Thus, the ILA leadership's act of ordering American longshoremen employed by American stevedore firms to refuse to load cargoes to or from Russia because of a disapproval of the Russian invasion of Afghanistan should be held to be an illegal secondary boycott, particularly since it resulted in a substantial disruption of international trade.

[9] While not conceding that these facts would be relevant even if proved, Allied notes that the ILA has already attempted and failed in NLRB Case No. I-CC-1753 to prove at a trial on the merits the very facts it asserts on pp. 35, 44 & 45 n.47, 65 & 66 of its brief that it wishes to attempt to prove in this case. S.M. at 2a, 4a-6a, 28a-30a, 32a-33a and 47a-52a.

There is nothing in the plain language of the NLRA Section 8(b)(4) proscriptions against union secondary boycotts or in any other provision of the LMRA that requires either a non-political primary dispute or an American situs of a primary dispute before an American secondary boycott can be proscribed.

The proscription of such a secondary boycott is required by the purposes of Section 8(b)(4). The Wagner Act of 1935, and other federal legislation specially benefiting labor unions, gave unions unique monopoly-like powers possessed by no other kinds of organizations in American society. Concerned about abuses of these powers that unduly injured the public without providing any benefits essential to workers, Congress in 1947 enacted the LMRA, including its proscriptions against secondary boycotts. The fundamental purposes of these secondary boycott proscriptions were to protect a union's right to exercise these special monopoly-like powers against the employer of the workers represented by that union for the primary object of improving the terms and conditions of employment of those workers, but to shield unoffending employers and others from the use of these powers for more remote objects. *NLRB* v. *Denver Building & Construction Trades Council*, 341 U.S. 675, 692 (1951). Thus, the more remote a union's object from the wages, hours, and terms and conditions of employment of the workers ordered by that union not to work, the more compelling is the reason for application of the proscriptions of Section 8(b)(4).

Nothing in *American Radio Association* v. *Mobile Steamship Association*, 419 U.S. 215 (1979) or any other of this Court's "foreign-flag ship cases" prevents Section 8(b)(4) from applying to the ILA's Russian boycott. The foreign-flag ship cases, and the comity considerations upon which they are predicated, are concerned only with situations where the union's conduct occurs in proximity to a foreign ship with a foreign crew in an American port and is a direct effort to impose American regulations and standards upon that foreign

ship and its crew. These cases do not reach a situation where the union's harmful conduct in America arises out of its objection to the conduct of a foreigner in a pre-existing foreign dispute, let alone reach a situation where the union's objection is to the cargo carried by the ship rather than any aspect of the ship itself. Moreover, a comity problem can only arise in a situation where the union's conduct may be arguably protected by Section 7 of the NLRA, 29 U.S.C. § 157, and thus cannot exist in this case where there is no such arguable protection.

There is no substantial First Amendment interest involved in this case. The issue in this case is the right of union leaders to order secondary boycotts, not the right of individual workers to refuse to do work they find unconscionable. Moreover, the kind of "conscience" interest asserted is essentially political rather than conscientious. *Gillette* v. *United States*, 401 U.S. 437, 455 (1971). In any event, any residual First Amendment interest that may be involved is overwhelmingly outweighed by the legitimate need to protect the economy and the national interest against the kind of massive trade disruption and damage to foreign relations that occurred as a result of the ILA's Russian boycott.

## Argument

### A Union President's Directive To Union Members To Refuse To Handle Product Of A Foreign Nation Because Of Union Disapproval Of A Foreign Policy Act Of That Nation Violates The Labor Management Relations Act, 1947.

### A. *Introduction*

The National Labor Relations Board, the agency entrusted with the responsibility for administering and interpreting the

complex secondary boycott provisions of the NLRA,[10] has succinctly described the ILA's Russian boycott as "conduct classically subject to and violative of Section 8(b)(4) of the National Labor Relations Act. . . ." S.M. at 1a. The Board stated:

> It is difficult to imagine a situation that falls more squarely within the scope of Section 8(b)(4) than the one before us today. Here, the Union's sole dispute is with the USSR over its invasion of Afghanistan. Allied, Waterman, and Clark have nothing to do with this dispute. Yet the Union's actions in furtherance of this disagreement with Soviet foreign policy have brought direct economic pressure on all three parties and have resulted in a substantial cessation of business. Thus, the conduct alleged in this case is precisely the type of conduct Congress intended the National Labor Relations Act to regulate. S.M. at 14a.

As pointed out by the court below, the ILA's conduct is a typical "hot cargo" secondary boycott, i.e., a refusal to handle the product of the entity with whom the union has its primary dispute. 15a-16a, 640 F.2d at 1375. Stated otherwise, if Allied's wood had come from trees cut by non-union lumberjacks in South Carolina rather than from Russian trees and if ILA President Gleason had ordered that this South Carolina wood not be handled because it came from trees cut by non-union lumberjacks, the union's action would undoubtedly have violated Section 8(b)(4) of the Act.

The central questions posed by this case are thus whether there are any compelling reasons why the result should be different solely because the primary dispute between the ILA and the Soviet Union was a political dispute rather than a labor dispute or solely because the locus of the Soviet act giving rise to that primary dispute (Afghanistan) was overseas rather

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[10] *Local 761, International Union of Electrical Workers* v. *NLRB*, 366 U.S. 667, 674 (1961); *NLRB* v. *Retail Store Employees, Local 1001, (Safeco)*, 447 U.S. 607, 100 S.Ct. 2372, 2377 n.11 (1980).

than on American soil. Allied submits that an analysis of the language and purpose of the Labor Management Relations Act of 1947 discloses no reasons why these factual variations should dictate a different result.

### B. *The Political Nature of the Union's Ultimate Object Should Not Affect the Result*

Neither the language nor the purpose of the Labor Management Relation Act limits the application of its secondary boycott prohibitions[11] to "labor disputes", as defined in that Act, or otherwise prevents those provisions from applying to secondary union conduct arising out of a primary dispute over a political or any other kind of matter.

The Labor Management Relations Act constituted a massive change and expansion in the scope of defined obligations of labor unions. The provisions of the simpler National Labor Relations Act of 1935, commonly known as the Wagner Act, were almost exclusively devoted to conferring rights upon labor unions and employees. The LMRA significantly rewrote the Act to provide that various types of union conduct, including secondary boycotts, constituted unlawful activity subject to control by the NLRB and the courts. Moreover, the entire National Labor Relations Act as so amended was relegated to being but Title I in the new five Title comprehensive LMRA scheme. Two of the other four Titles also further substantially restricted certain kinds of union conduct.[12]

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[11] The plain language of the relevant portions of these statutes is set forth at pp. 2-3 of the ILA's petition for certiorari.

[12] Portions of Title II gave the President rights in the event of national emergency strikes, § 206 *et seq.*, 29 U.S.C. § 176 *et seq.*, while portions of Title III gave employers rights to sue for union breach of collective bargaining agreements, § 301, 29 U.S.C. § 185, prevented union representatives from receiving certain kinds of payments from employers, § 302, 29 U.S.C. § 186, created the right to sue unions for secondary boycott damages at issue in the instant case, § 303, restricted union political expenditures, § 304, 2 U.S.C. § 251 and made strikes by government employees unlawful, § 305, 29 U.S.C. § 188.

While the term "labor dispute" is defined in both the LMRA and its NLRA component, 29 U.S.C. §§ 142(3) and 152(9), there is nothing that either limits all provisions of the LMRA to cases falling within that definition or that limits the statutory secondary boycott provisions at issue to such cases. In fact, when Congress saw fit to so limit the Act, it did so by specific statutory language. *See e.g.*, Section 203(a), 29 U.S.C. § 173(a), which sets forth the functions of the Federal Mediation and Conciliation Service. On the other hand, all of the LMRA cannot be subject to the "labor dispute" definition. The application of that limitation to provisions such as Section 304, which regulated political campaign contributions, makes no sense whatsoever. While Allied is aware of no cases in point on the question, Allied cannot imagine that Section 305, or its successor statutory provisions, would be construed so as to exclude from coverage strikes for political objectives by federal government employees.[13] Most significantly, this Court, in *United Assoc. of Journeymen & Apprentices of the Plumbing & Pipefitting Industry* v. *Local 334, Plumbers*, ____ U.S. ____, 101 S.Ct. 2546, 2551 (1981), recently held that Section 301 of the LMRA covered a dispute that was not only not a "labor dispute", but also was not even a dispute with any foreseeable "impact on labor management relations or industrial peace." This Court premised its holding upon the plain language of the statute and the lack of any legislative history negating that plain language. This Court also relied on the rationale that LMRA jurisdiction would "contribute to the achievement of labor stability." 101 S.Ct. at 2550-2551. Thus, where, as here, the plain language of the statute also covers the dispute without such coverage being negated by any

[13] Section 304 amended § 313 of the Federal Corrupt Practices Act, 1925, 2 U.S.C. § 251, and later became § 610 of the U.S. Criminal Code, 18 U.S.C. § 610, which was repealed by Pub.L. 94-283, Title II, § 201(a), 90 Stat. 496 (1976) and transferred to § 321 of the Federal Election Campaign Act of 1976, 2 U.S.C. § 441(b). Chapter 690 of the Acts of 1955, § 4, 69 Stat. 625 (1955) repealed 29 U.S.C. § 188 and transferred its substantive and remedial provisions as expanded into 5 U.S.C. §§ 3333 and 7311 and 18 U.S.C. § 1918.

legislative history, LMRA coverage would contribute to the achievement of labor stability and the dispute obviously does have an impact upon labor-management relations and industrial peace, there *a fortiori* must be coverage.[14]

The conclusion that obligations imposed by the LMRA on unions are intended to reach beyond the labor dispute definition, unless specifically precluded in a specific provision from doing so, is further fortified by the fact that the LMRA and NLRA definitions of "commerce", "affecting commerce" or "industry affecting commerce" either do not mention the term "labor dispute" or, even more significantly, list it as but one disjunctive element of the definition. *See* Section 2(6) of the NLRA (no listing) and Section 2(7) of the NLRA and Section 501(1) of LMRA (disjunctive listings). The text of these provisions is in the Appendix to this brief. Additionally, the Short Title and Declaration of Policy of the LMRA, 29 U.S.C § 141, mentions "labor dispute" only in connection with one of its many clauses setting forth the purposes and policies of that Act, and the Section I "Findings & Policies" of the NLRA, 29 U.S.C. § 151, nowhere mentions "labor dispute". Finally, the LMRA Section 501(2), 29 U.S.C. § 142(2), definition of the term "strike", which is inherently involved with Section 8(b)(4) secondary boycott cases, contains no "labor dispute" limitation.[15]

The conclusion that the ILA's political objective does not transmute an otherwise routine secondary boycott into a primary strike or for any other reason deprive the public and innocent neutrals of their normal rights to injunctive and damage relief is also consistent with the purpose of Section

[14] The close relationship of § 303 to § 301 is signified by the fact that § 303(b) incorporates the procedural provisions of § 301.

[15] "The term strike includes any strike or other concerted stoppage of work by employees (including a stoppage by reason of the expiration of a collective bargaining agreement) and any concerted slowdown or other concerted interruption of operations by employees." 29 U.S.C. § 142(2).

8(b)(4) — particularly as viewed in the context of the history of American labor relations and labor law. Labor unions are unique kinds of organizations. By virtue of statutes such as the National Labor Relations Act, labor unions were granted extensive and unique monopoly-like rights not accorded business, political, social or other kinds of associations or organizations.[16] These rights are the foundation of the power that is today exercised on a national or major regional basis by the ILA and other large and wealthy international unions — including the rights and powers to disrupt commerce and injure innocent third parties through strikes and other work stoppages. It is submitted that American history establishes that these rights and powers were uniquely granted unions so that they could improve the wages, hours, and working conditions of American workers and thus ultimately benefit not only those workers, but society as a whole. There is no evidence to indicate that these rights and powers were granted unions because it was believed that labor union leaders possessed such unique disinterest or expertise in political or foreign policy matters that the national interest would be advanced by union ordered strikes and stoppages over political and foreign policy matters.

As time progressed, it was perceived that unions may have been granted too many rights and too much power and that too often the public and innocent third parties were being hurt by strikes and stoppages whose objects were becoming increasingly remote from traditional primary objects. Ultimately, in 1947 the LMRA's secondary boycott provisions were enacted

[16] These include rights to represent and in some cases to be paid dues by individuals who do not desire such representation or wish to pay such dues, rights to bargain with private employers who do not wish to bargain and certain immunities (from antitrust laws) that foster national or regional multi-employer collective bargaining. *See generally The False Doctrine of Mutuality*, Appendix D to the Minority Views in S. Rep. No. 187 in S. 1555, 86th Congress, 1st Session, *reprinted in* LEGISLATIVE HISTORY OF THE LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT OF 1959 507 (1959).

to achieve the dual objectives of prohibiting unions from using their extensive federally granted powers to injure the public by means of strikes for remote objects, but still of permitting them to use those powers in a manner consistent with traditional concepts of workers improving their own wages, hours, and working conditions by striking their own employers. *NLRB* v. *Denver Building & Construction Trades Council, supra,* 341 U.S. at 692. *See also* legislative history and authority at S.M. at 12a-14a.

Given that a secondary work stoppage for a political objective must by its nature be more remote from a union's legitimate interest in its members terms and conditions of employment than a secondary work stoppage in support of an objective of improving one or more of those employment terms and conditions, the Act's purposes require that the political secondary stoppage be prohibited at least as strictly as the economic secondary stoppage. Thus, the court below correctly concluded that "without even the justification of a labor-oriented motive, [the union's] forbidden secondary activity is *a fortiori* precluded." 21a, 640 F.2d at 1378. *Cf. NLRB* v. *Washington-Oregon Shingle Weavers Dist. Council,* 211 F.2d 149, 152 (9th Cir. 1954). Moreover, of the six circuit courts that have considered the matter, including the court of appeals below, only the Fourth Circuit, in a split decision, has held that a "labor dispute" is essential for LMRA jurisdiction. *Compare NLRB* v. *ILA (Ocean Shipping),* 332 F.2d 992 (4th Cir. 1964) *with Soft Drink Workers, Teamsters Local 812* v. *NLRB,* __ F.2d __, 105 LRRM 2658 (D.C. Cir. 1980), *National Maritime Union* v. *NLRB,* 346 F.2d 411 (D.C. Cir.), *cert. denied,* 382 U.S. 840 (1965), *NLRB* v. *Twin City Carpenters Dist. Council* 422 F.2d 309 (8th Cir. 1970), *NLRB* v. *Local 11, Carpenters,* 242 F.2d 932 (6th Cir. 1957) and *NLRB* v. *Washington-Oregon Shingle Weavers Dist. Council, supra.*[17]

[17] In S.M. at 13a n.15, the NLRB has similarly listed the authority for the proposition that no primary dispute is necessary for a Section 8(b)(4)

The determination in *Ocean Shipping, supra*, 332 F.2d at 995-996, that a "labor dispute" is essential to LMRA jurisdiction rested primarily upon plucking an illustrative sentence from *Marine Cooks & Stewards* v. *Panama Steamship Co.*, 362 U.S. 365, 372 (1960) out of context. *See* the subsequent discussion by the Court of Appeals for the District of Columbia in *National Maritime Union* v. *NLRB, supra*, 346 F.2d at 415-416.

In addition, it appears that the law review commentary on the subject of ILA political boycott activity has unanimously concluded that such activity should be found to be a secondary boycott violating the Act. Note, 78 HARV. L. REV. 463 (1964); Note, 51 VA. L. REV. 157 (1965); *Caddell, Longshoremen's Embargo of Soviet Goods: A Secondary Boycott or a Political Protest*, 32 MERCER L. REV. 857 (1981); *Maatman, Protest Boycotts and Federal Labor Laws: The Russian Trade Boycott Litigation*, 3 NORTHWESTERN JOURNAL OF INTERNATIONAL LAW & BUSINESS 211 (1981).[18]

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violation. While the ILA is correct in pointing out at p. 40 of its brief that some of these courts have raised a question as to whether the Act should apply to an ILA political boycott, none have held it should not, and none have had the benefit of this Court's recent teaching in *United Assoc. of Journeymen & Apprentices* v. *Local 334 Plumbers* that the plain language of LMRA coverage controls unless there is compelling legislative history or policy to the contrary, particularly where such coverage would contribute to the achievement of labor stability.

[18] Allied's basic position that the existence of a "labor dispute" is not a jurisdictional pre-requisite for the application of LMRA secondary boycott sanctions renders irrelevant to the instant case the answer to the question presented in *Jacksonville Bulk Terminals* v. *ILA*, No. 80-1045, as to whether the ILA's Russian boycott is a "labor dispute". However, if this Court disagrees with Allied and concludes that a labor dispute is a jurisdictional pre-requisite for the application of the secondary boycott provisions, then the outcome of *Jacksonville Bulk Terminals* may become highly relevant. In that event, Allied would agree with the conclusion of the Solicitor General in the *Jacksonville Bulk Terminal* case that while the ILA's conduct is a "labor dispute", it is subject to being enjoined. Allied submits that a finding that the ILA's conduct is a violation of Section 8(b)(4) is far more important to the national interest in preventing future boycotts of this kind than a finding that the ILA's conduct is not a "labor dispute". The LMRA statutory scheme

In attempting to justify its Russian boycott, the ILA stresses the highly conceptual argument that its object was solely protest and that a solely protest object does not amount to a "cease doing business" object within the meaning of Section 8(b)(4). ILA Main Brief at pp. 24-28. Allied submits that this proferred justification ignores the fundamental principle of tort law that a tortfeasor is not exonerated from responsibility for the foreseeable consequences of his actions by resorting to the argument that his actual intent was something else. A secondary boycott is in the nature of a tort. *Consolidated Express, Inc.* v. *New York Shipping Assoc.*, 602 F.2d 494, 509 (3d Cir. 1979), *vacated on other grounds*, 448 U.S. 902 (1980). The responsibility of tortfeasors for the foreseeable consequences of their acts is demonstrated by the following illustration from RESTATEMENT (SECOND) OF TORTS, § 8A (1965):

> A throws a bomb into B's office for the purpose of killing B. A knows that C, B's stenographer, is in the office. A has no desire to injure C, but knows that his act is substantially certain to do so. A is subject to liability to C for an intentional tort.[19]

Consistent with these principles, this Court has squarely affirmed that an object of a union's boycott for purposes of Section 8(b)(4) can be determined from the foreseeable conse-

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allows anyone injured by a secondary boycott to bring an action to terminate that boycott. Thus, so long as there is LMRA coverage, a powerful union cannot frustrate the national interest by using its power to obtain a provision in its collective bargaining agreements with employers permitting it to order such boycotts. Indeed, such a provision in a collective bargaining agreement violates § 8(e) of the NLRA, 29 U.S.C. § 158(e). *See also* p. 31 n. 29 *infra*, discussing the probable reluctance of contracting employers to pursue private remedies. If there were no LMRA coverage, a union like the ILA might frustrate the national interest by negotiating such a provision.

[19] In this illustration injury to C is not even necessarily consistent with the ultimate asserted object of injury to B. Where, as in the instant case, a massive trade disruption with Russia is consistent with an asserted ultimate object of protesting a Russian action, liability for foreseeable consequences must follow.

quences of its conduct. *Safeco, supra*, 100 S.Ct. at 2377; *NLRB* v. *Local 825, IUOE (Burns & Roe)*, 400 U.S. 297, 305 (1971).[20] Indeed, as discussed by the court below, a "protest" aspect, element or assertion is almost inevitably involved in any hot cargo type of secondary boycott that routinely arises and thus resort to the foreseeable consequences test is also routinely involved. 15a-16a, 640 F.2d at 1375-1376.

Finally, the ILA appears to argue that it was not foreseeable that its conduct would result in a substantial cessation of doing business involving Allied or any other secondary employers because its interference with their business was limited to its refusal to handle only their Russian cargoes and did not extend to refusals to handle other cargo or to other retaliation against them. ILA Brief at pp. 27-28. However, the law is settled that so long as it is foreseeable that the business disruption caused by a given degree of secondary union conduct will rise at least to the level of being "substantial", the fact that the union could have been more disruptive is no defense. *Burns & Roe, supra*, 400 U.S. at 304-305; *Local 5, United Assoc. of Journeymen* v. *NLRB*, 321 F.2d 366, 370 (D.C. Cir.), *cert. denied*, 375 U.S. 921 (1963). Unions such as the ILA have immense power, and the exercise of even a portion of that power can in fact have devastating results on innocent third parties, the public and trade and foreign policy.

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[20] The ILA's assertion at p. 25 of its brief that the application of a foreseeable consequences test to this case would make every strike or every refusal to handle illegal is nonsensical. As pointed out by the court below, the union's conduct here cannot be "characterized as 'primary activity' ", thus distinguishing it from the many other common situations discussed at n.6 by that court. 16a-17a, 640 F.2d at 1376. The ILA's Russian boycott advances or protects no primary interest of the longshoremen it represents unless the law is to move to the radical degree that the political acts or views of an employer's suppliers or customers are to be construed as "terms and conditions of employment" within the meaning of § 8(d) of the Act, 29 U.S.C. § 158(d). In sum, where a union's conduct is primary, that union has nothing to fear from § 8(b)(4). Where it is secondary, § 8(b)(4) will normally apply.

The determination in *Ocean Shipping, supra,* 332 F.2d at 996-998, that the conduct involved there was not secondary was erroneous primarily because it did not adequately take into account the reality, as subsequently more clearly articulated by this Court in *Burns & Roe* and *Safeco,* that the "original congressional concern" demands that "flagrant secondary conduct with these most serious disruptive effects" be found to be prohibited by Section 8(b)(4). *Burns & Roe,* 400 U.S. at 305.

### C. *The Foreign Situs of the Dispute Motivating the Union's American Disruption Should Not Affect the Result.*

For a long time there was no exception to the doctrine that the meaning of the term "in commerce" in the National Labor Relations Act and the Labor Management Relations Act was co-extensive with the constitutional reach of the Commerce Clause. As stated in *Guss* v. *Utah Labor Board,* 353 U.S. 1, 3 (1956):

> Since it was first enacted in 1935, the National Labor Relations Act has empowered the National Labor Relations Board "to prevent any person from engaging in any unfair labor practice . . . affecting commerce." By this language and by the definition of "affecting commerce" elsewhere in the Act, *Congress meant to reach the full extent of its power under the Commerce Clause* (citation omitted) (emphasis added).

*See also NLRB* v. *Fainblatt,* 306 U.S. 601 (1939); *Polish National Alliance* v. *NLRB,* 322 U.S. 643, 647-648 (1949); legislative history cited at S.M. at 9a-10a.

To the knowledge of Allied, the first exception to this doctrine was *Benz* v. *Compania Naviera Hidalgo,* 353 U.S. 138 (1957). In *Benz* this Court held that the protections of the Act should not be construed to protect picketing by American

unions supporting a strike by foreign seamen against their foreign shipowner-employer at the situs of that strike. This Court noted that a "storm of diplomatic protest" arose as a result of an earlier effort by some in Congress to dictate pay procedures for foreign seamen on foreign ships and concluded that "For us to run interference in such a delicate field of international relations there must be present the affirmative intention of the Congress clearly expressed." 353 U.S. at 146-147. Similar concerns over possible interference with international relations motivated this Court to deny coverage of the Act in *McCulloch* v. *Sociedad National deMarineros*, 372 U.S. 10 (1963) and *Incres Steam Ship Co.* v. *International Maritime Workers*, 372 U.S. 24 (1963) — cases raising questions, respectively, of whether the NLRB had jurisdiction to conduct a representation election among foreign seamen on a foreign ship and whether an American union's picketing to represent such seamen was protected under the Act. However, this Court in *Incres*, for no articulated reason, added the observation that "The Board's jurisdiction to prevent unfair labor practices ... is based upon circumstances 'affecting commerce', and we have concluded that maritime operations of foreign-flag ships employing alien seamen are not 'in commerce' within the meaning of [the Act]." 372 U.S. at 27.

Eleven years later in *Windward Shipping* v. *American Radio Association*, 415 U.S. 104, 112-113 (1974), this Court affirmed that the references to the statutory terms "in commerce" and "affecting commerce" in *Incres* were nothing more than statutory pegs upon which comity considerations, and only comity considerations, were hung when it stated that "Those cases which deny jurisdiction to the NLRB recognize that Congress when it used the words 'in commerce' in the LMRA simply did not intend the Act to erase longstanding principles of comity and accommodation in international maritime trade." This Court in *Windward* then held that the Act did not protect an American union's picketing of a foreign-

flag ship to protest the failure to pay American wage rates to the foreign seamen employed on that ship. Finally, in *American Radio Association* v. *Mobile Steamship Association*, 419 U.S. 215, 222 (1974), this Court held that the identical conduct involved in *Windward* was also not within the jurisdiction of the Act for secondary boycott purposes, stating that "We do not believe, however, that the line of cases commencing with *Benz* and culminating in *Windward* permit such a bifurcated view of the effects of a single group of pickets at a single site."[21]

Each of those foreign-flag ship cases in which LMRA jurisdiction was denied essentially involved an effort instigated or supported by an American union occurring in proximity to foreigners on a foreign ship to impose directly American conditions or regulation upon that ship — conduct that would have been at least arguably protected under Section 7 of the NLRA had the NLRA applied.[22]

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[21] The aforecited cases and *ILA, Local 1416* v. *Ariadne Shipping Co.*, 397 U.S. 195 (1970) are commonly known as the foreign-flag ship cases. In *Ariadne* it was held that the Act could apply to a dispute over the wages to be paid Americans for longshore work on a foreign ship in an American port since application of United States law "would have threatened no interference in the internal affairs of foreign-flag ships likely to lead to conflict with foreign or international law." 397 U.S. at 200.

[22] All of the cases except *McCulloch* involved picketing at the situs of the primary dispute — the ship whose terms and conditions of employment incurred the displeasure of the picketing union. Picketing at a primary situs, at least so long as it is for an object related to terms and conditions of employment (see n. 24 *infra*), is normally primary activity protected by Section 7 of the Act unless there is evidence to indicate that a broader impermissible secondary object also exists, *see e.g.*, *Windward*, *supra*, 415 U.S. at 109; *Local 761, IUE (General Electric)*, *supra*; *IBEW, Local 211 (Atlantic County Improvement Authority)*, 248 NLRB 168, 172-173 (1980), or unless it is picketing for a recognitional object that exceeds the limits of § 8(b)(7) of the Act. *McCulloch* involved an effort to obtain an NLRB election which is clearly protected activity. Accordingly, Allied submits that there is no basis for the assertion by the ILA in its brief at p. 14 n.12 that *Mobile* clearly involved secondary activity. The answer to the question of whether it was primary or secondary would depend upon the outcome of an analysis of all the facts akin to the analysis employed in *Atlantic County Improvement Authority*, *supra*.

In these narrow and unique circumstances, it can make sense to hold that a comity rationale precludes NLRA jurisdiction. Foreigners would foreseeably be seriously offended if such direct and proximate interference in their traditional right to run their ships as they saw fit was sanctioned and protected by the full majesty of American national legislation. However, where, as in the instant case, the union's conduct in America involved protesting the conduct of a foreign party to an already existing primary dispute overseas, the Court was careful to specify that the Act could still apply to that American union conduct. *See Mobile Steamship Assoc., supra,* 419 U.S. at 225 n.10, where the validity of *Madden* v. *Grain Elevator Workers Local 418,* 334 F.2d 1014 (7th Cir. 1964), *cert. denied,* 379 U.S. 967 (1965) and *Grain Elevator Workers Local 418* v. *NLRB,* 376 F.2d 774 (D.C. Cir. 1967), *cert. denied,* 389 U.S. 932 (1967) were specifically affirmed. In such cases there is no interference by the union "in the management or affairs of foreign companies, workers, or labor organizations," 12a, 640 F.2d at 1374, and no "attempt to regulate the internal management of the Canadian ships." S.M. at 12a. Applying federal law to protests in America by Amercians over the conduct of foreigners in a pre-existing dispute simply does not present the kind of objectionable direct intrusion into traditional international law and practice concepts of sovereignty as is presented by applying federal law to protect conduct largely instigated by Amercians at the site of a foreign ship to impose by legal or economic coercion American laws, procedures or standards upon the management of that ship.

Indeed, the relevance of the foreign-flag ship cases to the issue posed by the instant case is in any event remote. The portion of the Russian boycott at issue here is the product (cargo) boycott. It is not the boycott of Russian ships. If the President of a Teamster Union local in Omaha, Nebraska ordered his truckdrivers and warehousemen not to handle Russian prod-

uct because of the Russian invasion of Afghanistan, the case would be conceptually identical to the instant case. However, the relevance to this Nebraska situated problem of rules and rationales rooted in the traditional law of the high seas, such as *The Charming Betsy*, 2 Cranch 64 (1804), *Brown* v. *Duchesne*, 19 How. 183 (1857), *Wildenus's Case*, 120 U.S. 1 (1887)[23] and the other high seas cases upon which this Court predicated its foreign-flag ship decisions, would be something less than obvious. This is a hot cargo product boycott case, not a case involving a dispute over a ship or some aspect of the operation of a ship.

The reason the foreign-flag ship cases were an exception to the usual rule that a United States statute is presumed to govern all conduct within its terms within the territory of the United States was that foreign ships are foreign territory and applying the LMRA to the conduct in question in U.S. ports could have therefore controlled conduct abroad. RESTATEMENT (SECOND) FOREIGN RELATIONS LAW OF THE UNITED STATES § 38, Reporter's notes at p. 109 (1965). Surely, no argument can be made that LMRA jurisdiction over the ILA's Russian boycott will control the outcome of the war in Afghanistan. Therefore, law involving the narrow and unique problem of rights of foreigners versus rights of Americans with respect to disputes on board foreign-flag ships in American ports does not have a direct bearing on the problem at hand.

However, in terms of comity considerations, the distinction between a direct primary interference and interference in support of a primary dispute elsewhere is not the only significant difference between the ILA's Russian boycott and the foreign-flag ship cases. At least as important is the point that, under settled legal principles, no possible interpretation of the facts could result in a finding that the Russian boycott was pro-

[23] *The Charming Betsy* and *Wildenus's Case* were cited at p. 21 of *McCulloch* and *Brown* v. *Duchesne* was cited at p. 146 n.7 of *Benz*.

tected by Section 7 of the Act.[24] In contrast, as pointed out at p. 21 n.22 *supra*, the picketing at the primary situs context involved in the foreign-flag ship cases normally raises the possibility that a factual analysis by the NLRB could result in a determination that the picketing is protected. Since the comity concern that foreigners might be offended and tempted to retaliate arises only out of the possibility that conduct offensive to foreigners might be held by the NLRB to be protected, then when, as in the instant case, there is no possibility that the conduct in question might be held protected, comity considerations vanish and there is no reason for denying NLRB jurisdiction on the basis of the precedent of the foreign-flag ship cases.[25]

A basic disagreement between Allied and the ILA is with respect to the ILA's statement at p. 19 of its brief that "the foreign entity's pique or pleasure at the result is not the crux

[24] For the reasons set forth on pp. 18-19 *supra*, the court of appeals below was right in concluding that the ILA's conduct under no reading of the facts can be characterized as primary, and the Fourth Circuit was therefore wrong in reaching a contrary conclusion in *Ocean Shipping*, *supra*. However, even if it is thought that there might be some reading of the facts that could result in the conclusion that Mr. Gleason's January 9, 1980 order to his longshoremen not to handle Russian cargo was primary and not secondary, the fact that it was for a political rather than an economic objective means that it, and conduct pursuant to it, was primary activity that was unprotected by Section 7 of the Act. *Eastex, Inc.* v. *NLRB*, 437 U.S. 556 (1978); *Auto Workers Local 174* v. *NLRB*, 645 F.2d 1151 (D.C. Cir. 1981). Thus, for either or both of these reasons, there is no possibility the ILA could prevail on a contention that its Russian boycott was protected activity.

[25] It is clear that no foreigner engaged in trade with the United States would be in the slightest offended by the application of LMRA secondary boycott sanctions to terminate disruptions to that trade. *See Plumbers Union* v. *Door County*, 359 U.S. 354, 359 (1959), where in refuting an argument that essential state functions might be impaired if LMRA secondary boycott proscriptions were applied to a disruption at a county building project this Court said "Board jurisdiction to grant relief, far from interfering with county functions, serves to safeguard the interest of such political subdivisions."

of the comity question." Allied would submit that such pique or pleasure is the crux of the comity question. Unless there is some possibility that some foreigner whose operations are directly affected may be piqued at a result, there is no comity reason not to apply a domestic law that might bring about that result, at least so long as the conduct in question occurs within United States territory.

In sum, Allied is suggesting a two step test for dealing with comity and jurisdiction of LMRA cases. The first step is to ascertain whether, under the facts as alleged, it is fairly arguable that the union's conduct is protected by Section 7 of the Act and whether, if it is so protected, the result will be offensive to foreigners. If the answer to either of these questions is in the negative, then no possible comity bar to federal jurisdiction exists, and no further inquiry is necessary. If, however, the answer to both of these questions is in the affirmative, then the second step is to decide whether the facts as alleged place the case in the category of those where the degree of foreseeable offense to foreigners arising from federal jurisdiction exceeds the value of federal jurisdiction to Americans, or *vice versa*.[25] While the application of this kind of test might possibly have the result of disadvantaging unions more often than management, (*See* ILA Brief at pp. 19, 23 and AFL-CIO *Amicus Curiae*

[25] The precedents of this Court establish some guidelines for this weighing process. Thus, *Ariadne* suggests that where the union's conduct is designed to improve directly the wages of American workers, federal jurisdiction is in order even if this result annoys foreigners. As discussed at p. 22 *supra*, *Mobile Steamship's* endorsement of the result in the *Grain Elevator Worker* cases suggests that federal jurisdiction is in order when the union's conduct in America is a protest over the conduct of a foreigner in a pre-existing dispute in a foreign land even though this result might also annoy that foreigner. On the other hand, *Mobile Steamship* and the other foreign-flag ship cases suggest that federal jurisdiction is not in order when the union's American conduct is a direct effort to impose American conditions or representation on foreigners that occurs in proximity to those foreigners and their foreign ship even though American commerce is to some extent affected.

Brief at p. 2),[37] the possibility of that result is no reason for discarding the suggested test. As discussed in more detail at p. 35 *infra*, management and unions have very different kinds of responsibilities, powers, and roles to play in our society, and it is therefore natural and right that some legal doctrines and judicial interpretations will burden unions more than management while others will burden management more than unions.

Allied submits that the determination of the Court of Appeals for the Fifth Circuit in *Baldovin* v. *ILA*, *supra*, that the foreign-flag ship cases precluded LMRA jurisdiction over the ILA's Russian boycott was wrong. The central misconception of *Baldovin* was the court's statement that "the secondary boycott prohibition was designed to narrow the labor controversy into a confrontation between the primary opponents." 626 F.2d at 450. While this may be the effect of the secondary boycott prohibition in many situations, the central purpose, as set forth pp. 13-15 *supra*, is to prevent strikes for remote objects while preserving union rights to strike for primary objects. Because of its misconceived focus on a confrontation between primary opponents rather than a proper focus upon a prevention of strikes for remote objects, the Fifth Circuit concluded that the ILA's Russian boycott conduct was not "in commerce" because of the remoteness of the Russian invasion of Afghanistan to commerce. 626 F.2d at 453-454. The Fifth Circuit felt it was "anomalous" that an injunction would issue when the primary dispute did not involve labor relations, but not issue in some circumstances (*e.g.*, *Windward*) when labor relations were involved. *Id.* Allied,

[37] The statement of the AFL-CIO at p. 2 of its *amicus curiae* brief that affirming the First Circuit's decision below without overruling all of the foreign-flag ship cases finding no LMRA jurisdiction means that "the union always loses" is clearly not true. In the *Mobile Steamship* case management specifically lost the right to access to the relatively swift and predictable processes of the NLRB to terminate any secondary conduct of a union that may be involved in a case of that kind.

however, submits that no such anomaly exists since the nature of the primary dispute, if any, is irrelevant. The more remote a union's secondary object, the more justification exists for an injunction. Allied further submits that the Fifth Circuit's misconceived focus on primary opponents resulted in its failure to consider anywhere in its opinion the central issue of whether the comity concerns upon which the foreign-flag ship cases were predicated had any real relationship to the Russian boycott fact situation. As demonstrated at pp. 21-25 *supra*, they have no such relationship.

Given that it has long been established that the production of wheat upon but a few acres can affect commerce sufficiently to justify federal jurisdiction, *Wickard* v. *Filburn*, 317 U.S. 111 (1942), it surely strains the plain meaning of words to conclude that the statutory terms "in commerce" or "affecting commerce" were not meant to cover the billions of dollars of imports and exports involved in American-Russian trade, including a rather substantial portion of America's wheat crop.

The LMRA is a "bill of rights both for American workingmen and their employers". *Benz*, *supra*, 353 U.S. at 144, quoting from H.R. Rep. No. 245, 80th Cong. 1st Sess. 4 (1947). American employers like Allied, American workingmen like longshoremen who disagree with the Russian boycott and the American workers in other industries throughout the nation who lost their jobs as a result of it, J.A. 33a-34a, all have LMRA rights not to be injured by union ordered secondary boycotts. It is these rights of these Americans in American commerce that have been violated.

Finally, Allied submits that the ILA's Russian boycott should be covered by the LMRA although the conduct involved in *Windward* and *Mobile* was not covered because the Executive Branch of the government through the Solicitor General is in the instant case urging LMRA coverage. It is respectfully submitted that in light of the Executive Branch's constitutional responsibility for the conduct of foreign affairs, it is better

equipped than the judiciary to determine the presence of comity considerations to restrict the application of federal statutes. Therefore, at least heavy weight should be accorded the position of the Executive Branch on such a question. *See Mexico* v. *Hoffman*, 324 U.S. 30, 35 (1945).

### D. *There Is No Substantial Constitutional Question*

Allied submits that the instant case raises no substantial constitutional issue. Persons engaged in political protest or expression involving orders and actions rather than merely "pure speech" are not protected against prior restraint or appropriate civil or criminal liability for damage to innocent bystanders if their manner of expression is "basically incompatible" with the normal activity of others. *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972). Allied is not aware of any decision of this Court according First Amendment protection to acts with a protest motivation that caused the massive and devastating direct and foreseeable damage to innocent third parties, the public, and American trade and foreign policy interests as were caused by ILA President Gleason's order to his longshoremen not to handle Russian cargo. Thus, the ILA's assertion of First Amendment protection must fail unless it can articulate some unusually compelling real First Amendment interest that was served by the conduct of its President, Mr. Gleason.

Not only has the ILA failed to articulate any such compelling interest, no First Amendment interest of any magnitude was served by Mr. Gleason's conduct. To the contrary, his ordering all longshoremen represented by the ILA to refuse to handle Russian cargo merely because, at most, some of them may have expressed a desire not to do so is patently offensive to the First Amendment interests, including conscience, of those longshoremen who may have felt that such a disruption of

trade with Russia was harmful to United States foreign policy or the cause of world peace. *Cf. TWA* v. *Hardison*, 432 U.S. 63, 85 (1977). It must always be kept in mind that the defendants in the instant case and in the related NLRB case, S.M. at 1a, are not the individual workers who either willingly or grudgingly obeyed the order not to handle Russian cargoes. The defendants are the union and its responsible officials who issued the order. Accordingly, the First Amendment interests at issue are not the conscience interests of the individual workers in not handling product they find morally repulsive, but rather the interests of unions and union officers in ordering workers not to handle product that the union officers assert is morally repulsive. *See* authority cited at 23a n.11, 640 F.2d at 1379 n.11 and by the Fifth Circuit in *Jacksonville Bulk Terminals* v. *ILA*, *supra*, 626 F.2d at 462-463.

Initially, the ILA's attempted justification for Mr. Gleason's conduct fails to recognize that the "conscience" interests asserted, whether they be those of the union leaders or of the membership, plainly do not rise to the level of the deep religious-like conviction that has been accorded maximum First Amendment protection. The ILA leadership's periodic refusal to handle orders does not go to all wars. As stated in *Gillette* v. *United States*, 401 U.S. 437, 455 (1971) "[O]ver the realm of possible situations, opposition to a particular war may more likely be political and nonconscientious, than otherwise." Indeed, even where a public employee's objections to performing a portion of her job were clearly conscientious, the First Amendment did not give her the right to refuse to perform. *Palmer* v. *Board of Education of City of Chicago*, 603 F.2d 1271 (7th Cir. 1979), *cert. denied*, 444 U.S. 1026 (1980). *See also Garman* v. *United States Postal Service*, 509 F. Supp. 507, 511 (N.D. Ind. 1981) ("The First Amendment is not a license to employees to perform only those duties which meet their private approval.")

Rather than attempting to articulate any specific compelling First Amendment interest that can only be served by granting its officers the right, at their sole discretion, to order all longshoremen not to handle Russian cargo, the ILA seeks to justify its conduct upon the general ground that since the officers of religious hospitals, private schools and corporations presumably can order their enterprises not to deal with whomever they choose on grounds of "conscience", as interpreted and applied by them, union leaders should have a similar right.[28] ILA Brief at pp. 35-37.

First and perhaps foremost, as described at pp. 14-15 *supra*, labor unions are the holders and beneficiaries of extensive federally granted monopoly-like rights and powers — which are particularly relevant in the context of this case. If the officers of a given company decide on grounds of conscience that their Company will not buy Allied's Russian wood, Allied still has many other possible customers, including competitors of that company. However, when the leaders of the ILA decide that longshoremen will not handle Russian wood, the union's federally granted monopoly-like powers cause the virtual cessation of Allied's ability to service its customers and the massive disruption of other Russian trade. If in response to complaints from some shareholders about Russian foreign policy, the officers of an electric public utility were to assert "conscience" as the reason for cutting off electricity to any manufacturer processing Russian raw materials while it was processing those raw materials, surely the utility could not raise a constitutional defense to an action against it by an adversely affected manufacturer.

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[28] This asserted "right" is not in most cases, however, a constitutional right. Thus, the "right" of a president of a corporation operating a hotel to order hotel employees to refuse to deal does not extend to ordering them to refuse to deal with blacks or other minorities regardless of the alleged state of the "conscience" of that corporation president or the hotel employees. Title II of the Civil Rights Act of 1964, Pub. L. 88-352, § 201 *et seq.*, 78 Stat. 243 (1964), 42 U.S.C. § 2000 *et seq.*. Legislation can and has restricted rights to refuse to deal in the business context and rights to order strikes in the labor union context, and such legislation does not violate the First Amendment unless the First Amendment interest at stake is unusually compelling in relation to the legitimate purpose achieved by the legislation.

Secondly, while part of the purpose of the management of a hospital, private school, or corporation is to decide with whom the enterprise does or does not deal, under the American system of labor law and labor relations, it is the employer, not the leaders of the union representing its employees, who decides with whom it deals.

Finally, unlike the traditional business context, in the union ordered refusal to handle context there is often an asymmetry between the damage done to owners of the product in question and the price paid by union leaders who order the refusal and the workers who obey that order. So long as the ports are reasonably busy, the longshoremen who obey the order not to handle Russian cargo lose little or no pay because there is plenty of other work, and the refusal to handle order thus creates little or no internal political problem for the union leadership. In contrast, Allied is nearly destroyed by the order.[29]

[29] A similar asymmetry exists that limits the value of § 301 of LMRA to deal with situations like the ILA's Russian boycott and highlights the need for application of LMRA secondary boycott provisions to protect rights of damaged parties and the public. So long as the ports are busy, the shipping associations who have collective bargaining agreements with the ILA lose little or nothing when the ILA boycotts Russian cargo. Accordingly, they have little reason to incur the displeasure of the ILA by bringing a § 301 action against the boycott in their ports. Accordingly, only five § 301 actions were brought against the ILA in response to its Russian boycott (*See* the ILA's Main Brief in *Jacksonville Bulk Terminals* v. *ILA*, No. 80-1045 at p. 3 n.3) despite the boycott's impact on Russian shipping in many other ports from Maine to Texas. The Boston Shipping Association specifically refused Allied's request to bring such an action in Boston. J.A. at 29a-30a. This illustrates a particularly insidious aspect of the ILA's Russian boycott. It is in substance a partial strike. See *NLRB* v. *Montgomery Ward & Co.*, 157 F.2d 486, 496 (8th Cir. 1946). In a normal strike, the workers striking, the union involved, and the employer being struck are all incurring substantial losses, and so all have an incentive to settle the strike and resume normal operations. In a Russian boycott type partial strike, however, these immediate parties to the strike are losing little or nothing, and thus there is little, if any, incentive for them ever to settle. Thus, like other illegal secondary boycotts, the ILA's conduct here creates pressures "significantly different in kind and intensity from the inconveniences a neutral employer experiences when someone with whom he is doing business is struck." *NMU* v. *NLRB*, *supra*, 346 F.2d at 418 n.13.

However, in the business context the losses are symmetrical. If a major customer of Allied refuses to buy its Russian wood on "conscience" grounds, both that buyer and Allied incur a major loss, while if the refusal is by a minor customer, the loss to both is minor.

In contrast to the unique damages and problems created by the union ordered political product boycott, no specific First Amendment interest can be cited to justify it — particularly given the plethora of other alternatives available to union leadership confronted with a situation where some of its members raise a concern about handling product for political reasons.[30] For example, a union can: (a) attempt to persuade employers and union members to agree to work assigning arrangements that will accommodate the concern of those workers who do not wish to handle the product in question while having the work done by those who do not share this concern; (b) attempt to persuade employers not to discipline those workers who do not wish to handle the product and vigorously challenge in grievance-arbitration any significant discipline of them by the employer; (c) attempt, within the limits defined in *NLRB* v. *Servette*, 377 U.S. 46, 49-54 (1964), to persuade employers to exercise their managerial discretion not to handle the product in question; (d) engage in consumer picketing of the product in question within the limits set forth in *Safeco, supra;* (e) engage in primary picketing of any business situs, fixed or ambulatory, of the primary within the rules for the scope and nature of such picketing set forth in law, *see e.g., Sailors Union of the Pacific (Moore Dry Dock)*, 92 NLRB 547 (1950); (f) engage in a brief or similar kind of protest motivated work stoppage or refusal to handle that perhaps does not

[30] The consideration of alternative means of communication and action is a relevant consideration in adjudicating the validity of a First Amendment defense except where the government action is targeted at ideas or information it wishes to suppress or shuts down a public forum traditionally associated with the public exchange of views. TRIBE, AMERICAN CONSTITUTIONAL LAW, §§ 12-20 and 12-21 at pp. 683-691 (1978) and authority cited therein. Since Mr. Gleason's boycott order does not come within the scope of either of these two exceptions, the ILA is wrong when it asserts at p. 38 n. 54 of its brief that considering alternatives is irrelevant.

amount to a violation of Section 8(b)(4) because it does not foreseeably result in a substantial disruption of business within the meaning of *Safeco* and *Burns & Roe*[31]; and (g) engage in any or all of the infinite multitude of constitutionally protected publicity or political activity to draw the public's attention to the political concern and to attempt to secure passage of legislation or other governmental action to help deal with it.

The rarity of this political boycott kind of conduct by American unions (with the notable exception of the ILA)[32] illustrates the success that in fact responsible American union leaders have had over the years in channeling political concerns of their members into the generally constructive modes suggested above rather than letting them spill over into the destructive mode of union leadership ordered refusals to handle. Thus, the resources of unions have been conserved for their statutory purpose of protecting and improving the terms and conditions of employment of the workers represented rather than squandered in quixotic and injurious political boycotts. The fact that over the years responsible union leaders have been able to advise their members that union sponsored secondary refusals to handle for political reasons were viewed by the NLRB as unlawful and could lead to damage awards depleting the union's treasury has foreseeably played a major

[31] It is possible that the ILA's twenty-four hour refusal to load or unload British ships in protest over the death of Bobby Sands might fit into this category. *See Maatman, Protest Boycotts & Federal Labor Laws: The Russian Trade Boycott, supra*, 3 N.W. INT'L L. & B., at 221-222.

[32] *Protest Boycotts & Federal Labor Laws*, at 218-227. The ILA's unique and apparently escalating history of resort to the union ordered political boycott tactic may illustrate that once a union leadership begins to set the precedent of capitulating to demands from a "single issue" faction in the union to use the union's power to order a boycott of products disfavored by that faction, it becomes increasingly difficult for that leadership to resist similar demands from other factions with respect to their particular concerns. On the other hand, it may simply reflect a uniquely arrogant or whimsical trait of the ILA leadership.

role in helping deter resort to this tactic. It is respectfully submitted that any decision by this Court that sanctions the ILA's Russian boycott, or in any way raises a question as to LMRA's coverage of it, will substantially compromise the ability of responsible union leaders to continue to be able to deal successfully and constructively with pressures from membership factions demanding union sponsored secondary political work stoppages.

In considering asserted First Amendment issues in the context of legislation regulating labor union conduct, this Court has consistently dealt with the realities of that context. It has sought to identify the real business or other legitimate interests protected by the legislation and to balance them against any real damage to articulated legitimate First Amendment interests. Thus, this Court has recognized the reality that picketing by an organized group is more than merely the abstraction of free speech. *Teamsters Local 695* v. *Vogt*, 354 U.S. 284, 289 (1957). It has recognized that the balance must be struck in favor of the First Amendment protected publicity interest when consumer picketing damage only discourages consumption, *NLRB* v. *Fruit Packers (Tree Fruits)* 377 U.S. 58 (1964), but struck in favor of the application of the Act's prohibitions when the reality of the foreseeable damage to a neutral rises to the level of ruin or substantial loss, *Safeco, supra*. The realities of the competing interests involved in deciding whether the First Amendment protects Mr. Gleason's Russian boycott order simply bear no relation to the realitites of the competing interests involved in deciding whether the First Amendment protects a religious hospital's rights to prohibit abortions on its premises or any of the other widely dissimilar fact situations involved in most of the cases cited by the ILA at pp. 33-43 of its brief.[33]

[33] Contrary to the ILA's arguments at pp. 30-31, 41 of its brief, precedents on the issue of the application of antitrust law to politically motivated

Looking to reality rather than abstraction is not, of course, a euphemism for unions always losing. Unions have been the beneficiaries of this Court's determination that real and legitimate First Amendment interests of individual employees, including religious and moral "conscience" type concerns such as views on desirability of abortion, must in the balancing process yield to the stronger economic and practical needs to compel those employees to support financially their collective bargaining representative. *Abood* v. *Detroit Board of Education* 431 U.S. 209, 222 (1977). Unions have also benefitted from this Court's recognition that the unique and special economic dependence of employees on their employer is a reality that permits governmental intrusion into the content and manner of employer speech during a union organizing campaign to a far greater extent than the First Amendment would ordinarily permit governmental intrusion into speech. *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 616-620 (1969).

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restraints are inconclusive and inapposite. This Court has never held that either the First Amendment *per se* precludes such application or that such application *per se* does not come within the intent of the statutes. Recent lower court cases on such issues have tended to involve split decisions, *see Missouri* v. *National Organization for Women*, 620 F.2d 1301 (8th Cir. 1980), *cert. denied*, 449 U.S. 842 (1981), or district courts disagreeing on similar facts, *Crown Central Petroleum Corp.* v. *Waldman*, 486 F. Supp. 759 (N.D. Pa. 1980), *rev'd on other grounds*, 634 F.2d 127 (3d Cir. 1980). *Compare Osborn* v. *The Pennsylvania-Delaware Service Dealers Assoc.*, 499 F. Supp. 553 (D. Del. 1980). *See also Costello Publishing Co.* v. *Rotelle*, ____F.2d ____, 1981-82 TRADE CASES ¶64, 352 (D.C. Cir. 1981). Commentators have suggested that in appropriate situations antitrust law should be applied to politically motivated acts. *See* I AREEDA & TURNER, ANTITRUST LAW § 205 (1978); SULLIVAN, HANDBOOK OF THE LAW OF ANTI-TRUST pp. 264-265 (1977); *Kestenbaum, The Antitrust Challenge to the Arab Boycott*, 54 TEXAS LAW REVIEW 1411, 1420-1422 (1976); *Bird, Sherman Act in Non-Commercial Concerted Refusals to Deal*, 1970 DUKE LAW JOURNAL 247 (1970). In any event, Allied submits that the ILA's Russian boycott involves more unwarranted disruption of commerce and trade and far less of a counterbalancing legitimate First Amendment interest than any of the fact situations in those cases where it has been held that antitrust law did not apply to a politically motivated restraint.

The decision of a panel majority in *Ocean Shipping, supra*, and of the district court below, 99a-108a,[34] are the only direct precedents for the proposition that LMRA coverage of the Russian boycott may give rise to a First Amendment problem. An analysis of the reasoning and authority of that panel majority shows its clear error in concluding that any First Amendment problem existed. The panel majority first erroneously equated the union leadership's refusal to handle products order with the very distinguishable, purely voluntary, decisions of individual consumers to engage in a consumer boycott. 332 F.2d at 999. It then further erroneously[35] implied that such union ordered product boycotts for political reasons were "not uncommon". *Id.* Finally, as authority for its conclusion that First Amendment protection existed, it cited cases involving rights of unions or civil rights organizations to provide legal services or the rights of such groups not to disclose the identity of their members and even cited one case which held that there was insufficient evidence to support a conviction for breach of the peace. 332 F.2d at 999 n 6 and cases cited therein. Obviously, none of these cases even arguably supports the proposition that a union's top leadership has a First Amendment right to wreak the havoc on commerce created by the ILA's Russian boycott. The court of appeals below effectively summarized the essence of the instant case as follows:

> We think it more rather than less objectionable that a national labor union has chosen to marshal against neutral parties the considerable powers derived by its locals and itself under the federal labor laws in aid of a random political objective far removed from what has

[34] The district court below relied essentially upon the authority and reasoning of the *Ocean Shipping* panel majority. *See Walsh* v. *ILA*, 488 F. Supp. 524, 530-531 (D. Mass. 1980), *vacated and remanded with instructions to dismiss on grounds of res judicata*, 630 F.2d 864 (1st Cir. 1980).

[35] The court below correctly pointed out that such union conduct was quite rare in the United States. 21a, 640 F.2d at 1378. Even the ILA agrees that its conduct was rare. ILA Brief p. 39.

traditionally been thought to be the realm of legitimate union activity ... The labor laws do not confer upon bargaining representatives a voice in the conduct of foreign policy. The fact that there have been few, if any, cases that have applied the secondary boycott provisions to activity motivated by a "purely political dispute" illustrates little more than the rarity with which labor unions have seen fit to engage in this sort of "political strike" conduct. The language of section 8(b)(4) and the congressional objectives that prompted its enactment point to no reason why the section should not prohibit such secondary pressure, for whatever reasons motivated. The potential danger of uncontrolled, whimsical activity is obvious. It must be remembered that a union's ability to apply crippling secondary pressure is greatly enhanced by its position under the federal labor laws; without even the justification of a labor-oriented motive, such forbidden secondary activity is *a fortiori* precluded (citation and footnotes omitted). 21a, 640 F.2d at 1378.

Finally, the ILA's argument that any First Amendment interests involved in political secondary boycott cases would receive more sympathetic hearing in state rather than in LMRA forums, ILA Brief pp. 42-43, has no merit. The injunction issue is particularly critical with respect to First Amendment considerations. The LMRA statutory scheme provides the unique safeguard of a two-step process before an injunction can be granted. Pursuant to the procedures of Section 10(b) and 10(1) of the NLRA, a private party alleging a violation of Section 8(b)(4) must first convince a regional director of the NLRB that there is reasonable cause to believe that there has been a violation. Only after the regional director is convinced that such cause exists, will he then petition the appropriate federal district court for relief, and, of course, in that forum he must bear the burden of proving to that court's

satisfaction the case for such relief.[36] In contrast, a private party can directly petition a state court for an injunction without the precondition of review by a neutral expert agency.

In general, there is much more merit to cases of this nature being litigated within the LMRA statutory scheme. The factual questions most likely to be involved in these kinds of cases are whether the union sponsored the boycott or whether individual workers spontaneously withheld services and whether substantial damage to neutrals was foreseeable as a result of the union conduct. Since the LMRA was enacted in 1947 the NLRB has been involved in perhaps thousands of cases arising in every imaginable factual context dealing with the issue of union responsibility or lack thereof for conduct of its members,[37] and this Court has specifically noted the NLRB's expertise on the issue of whether substantial damage is foreseeable. *Safeco, supra*, 100 S.Ct. at 2377 n.11. In contrast, a typical state trial court will rarely if ever deal with issues of this kind and is thus much more likely to make a major error.[38]

In sum, no substantial First Amendment issue is presented by this case, and there is therefore no reason for this Court to consider how it might interpret the statute if such an issue was presented. *See e.g., Tree Fruits, supra*, 377 U.S. at 63.

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[36] The private charging party at no time is even entitled to party status in the injunction proceeding. The prosecution of that proceeding lies exclusively with the regional director. *See Walsh* v. *ILA, supra*, 630 F.2d at 871.

[37] These cases often arise in the context of interpreting the provisions of § 2(13) of the Act, 29 U.S.C. § 152(13).

[38] In its cross-petition for certiorari in No. 80-1906 at pp. 12-13, Allied argued that LMRA and state jurisdiction over the Russian boycott could be concurrent. If this Court disagrees and believes that the boycott must be subject to either only LMRA or only state jurisdiction, then Allied submits that, for all of the reasons set forth in this brief, LMRA jurisdiction best protects the legitimate interests of all concerned — neutral employers, individual workers, unions and the public at large.

## Conclusion

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

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## APPENDIX

1. Section 2(6) of the National Labor Relations Act as amended, 29 U.S.C. § 152(6), provides as follows:

> 2(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

2. Section 2(7) of the National Labor Relations Act as amended, 29 U.S.C. § 152(7), provides as follows:

> 2(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

3. Section 501(1) of the Labor Management Relations Act, 1947, 29 U.S.C. § 142(1), provides as follows:

> 501(1) The term "industry affecting commerce" means any industry or activity in commerce or in which a labor dispute would burden or obstruct commerce or tend to burden or obstruct commerce or the free flow of commerce.

4. Section 501(3) of the Labor Management Relations Act, 1947, 29 U.S.C. § 142(3), provides as follows:

> 501(3) The terms "commerce", "labor disputes", "employer", "employee", "labor organization", "representative", "person", and "supervisor" shall have the same meaning as when used in the National Labor Relations Act as amended by this Act.